

DATE: April 14, 1999
CASE NO.: 1998-JTP-6

In the Matter of

COMMONWEALTH OF MASSACHUSETTS
Complainant

v.

U.S. DEPARTMENT OF LABOR
Respondent

**ORDER DENYING GRANT OFFICER'S MOTION FOR SUMMARY
JUDGEMENT AND REMANDING CASE TO GRANT OFFICER**

I. Jurisdiction and Procedural History

This case, which arises under the Job Training Partnership Act (the JTPA), 29 U.S.C. §1501 *et seq.*, and the implementing regulations found at 20 C.F.R. Parts 626-638, is before the Office of Administrative Law Judges of the U.S. Department of Labor on a request for hearing filed by the Complainant Commonwealth of Massachusetts (the Commonwealth) which seeks review of a final determination by the Grant Officer for the Employment and Training Administration (ETA) of the Respondent U.S. Department of Labor (the Department) to disallow certain costs under the JTPA. Section 166 of the JTPA, 29 C.F.R. §1576, provides in relevant part that a JTPA funds recipient upon whom a corrective action or a sanction has been imposed by the Secretary of Labor may request a hearing before an administrative law judge of the Department of Labor. *See also* 20 C.F.R. §§627.800, 627.801(a).

The final determination under appeal was issued to the Commonwealth on May 13, 1998 by the Grant Officer, disallowing \$9,107,986 in costs under the JTPA for 1994, 1995 and 1996. Respondent's Exhibit GX 1-4a-b.¹ As will be discussed in greater detail below, the Grant Officer's final determination resulted from an administrative decision by the Commonwealth, as the recipient of the JTPA funds in question, to disallow costs assessed against these funds by a subrecipient, the City of Lynn, Massachusetts. On May 29, 1998, the Commonwealth appealed

¹ Documentary evidence in the record is identified as "CX" for exhibits offered by the Complainant, "GX" for exhibits offered by the Respondent and "ALJX" for exhibits introduced by the Administrative Law Judge.

the final determination to the Office of Administrative Law Judges. GX 1-2. Pursuant to a pre-hearing order issued by the Chief Administrative Law Judge on June 18, 1998 (ALJX 2), the Commonwealth filed a pre-hearing memorandum on September 28, 1998, at which time it identified the following issues to be decided in connection with its appeal of the Grant Officer's final determination: (1) whether the Commonwealth is entitled to a waiver of the disallowed costs under section 164(e)(2) of the JTPA; (2) whether this proceeding should be stayed pending the outcome of the City of Lynn's appeal in state court; (3) whether the amount of \$9,107,986 disallowed by the Grant Officer is correct; and (4) whether the Grant Officer has met her burden of production. ALJX 7.²

On November 16, 1998, Administrative Law Judge David W. DiNardi issued a notice of hearing and pre-hearing order, scheduling a hearing in the matter for February 8, 1999. ALJX 10. On December 31, 1998, the Commonwealth moved to stay the proceedings before the Office of Administrative Law Judges pending the outcome of an appeal filed in state court by the City of Lynn seeking review of the Commonwealth's decision to disallow \$9,160,208 in costs under the JTPA program for 1994, 1995 and 1996. ALJX 11. By order issued on January 12, 1999, Judge DiNardi denied the Commonwealth's motion for a stay based on his finding that the outcome of the City of Lynn's appeal in state court is not material to the issues in the instant case. ALJX 14. On January 19, 1999, Judge DiNardi issued an order reassigning the case to me. ALJX 17.

Prior to the hearing on the merits, the Department filed a Grant Officer's Motion for Summary Judgement, in which it asserted that no material facts are in dispute and urging that the Grant Officer's final determination be affirmed. ALJX 15. The Commonwealth filed an opposition to the Respondent's motion, and I granted the Commonwealth's request for oral argument on the motion. ALJX 21, 23. Pursuant to my order granting the Commonwealth's request for oral argument, a limited hearing was conducted before me in Boston, Massachusetts on February 8, 1999 at which time both parties appeared and were afforded an opportunity to present their arguments on the Department's motion for summary judgement.³ At the close of the oral argument, I granted the Commonwealth's request for leave to file a post-hearing brief, and I subsequently granted the Department's motion for sequential briefing.⁴ Within the time frames

² The Commonwealth filed a supplemental pre-hearing memorandum on January 15, 1999, but raised no new or additional issues. ALJX 16.

³ A telephonic pre-hearing conference was conducted with counsel to both parties during the week of February 1, 1999, at which time the parties were advised that the hearing on February 8, 1999 would proceed for the limited purpose of hearing oral argument on the motion for summary judgement and that a full evidentiary hearing would be continued pending a ruling on the Department's motion.

⁴ At the oral argument, I allowed the parties until March 1, 1999 to file simultaneous briefs. Thereafter, counsel to the Department moved, with the concurrence of counsel to the Commonwealth, that I allow the Department to file its brief two weeks after receipt of the

allowed, both parties submitted their briefs, and the matter of the Department's motion for summary judgement is now ready for decision.

II. Background

A review of the statutory and regulatory framework governing JTPA grants and a summary of the chronology of events leading to the instant dispute is in order.

The JTPA was passed by the Congress to establish programs designed to prepare youth and adults facing serious barriers to employment for participation in the labor force by providing job training and other services that will result in increased employment and earnings, increased educational and occupational skills, and decreased welfare dependency, thereby improving the quality of the work force and enhancing national productivity and competitiveness. 29 U.S.C. §1501. As pertinent to this case, the JTPA provides for grants from the federal government to the states to fund educational assistance and training programs. 29 U.S.C. §1506. The JTPA and implementing regulations provide detailed guidelines governing the expenditure of JTPA funds by state recipients and their subrecipients and for the monitoring and investigation of grants to insure compliance with the JTPA and regulations. 29 U.S.C. §§1571-1583; 20 C.F.R. §§627.400-629.495. These oversight and compliance procedures include requirements for audits at both the state recipient and federal levels; 29 U.S.C. §§1574, 1575; 20 C.F.R. §627.480; and they mandate administrative complaint and grievance hearing procedures at local, state and federal levels. 20 C.F.R. §§627.501-627.504, 627.601-627.607. Reports of audits conducted by a recipient of JTPA funds must be provided to the Department's Office of Inspector General (OIG); 20 C.F.R. §627.480(c); and reports of federal level audits, which are conducted by the OIG or the Comptroller General, 29 U.S.C. §1575(b), are provided to the ETA Grant Officer. 20 C.F.R. 627.602(a)(1). Upon receipt of an audit report from the OIG, the Grant Officer is required to notify the recipient of the investigative findings and allow the recipient a period of time not to exceed 60 days in which to comment and take appropriate corrective action. *Id.* In cases where the Grant Officer is dissatisfied with a state's disposition of an audit, the Grant Officer must make an initial determination, 20 C.F.R. §627.606(b), and then provide the recipient with an opportunity, called the informal resolution period, to present documentation or arguments to resolve the matters in controversy before revoking a grant or imposing corrective action or sanctions. 20 C.F.R. §627.606(c). If the matter is not resolved informally, the Grant Office issues a final determination, 20 C.F.R. §627.606(d), and the recipient may then request a hearing before an administrative law judge. 20 C.F.R. §627.801(a).

Pursuant to the provisions of the JTPA, the Commonwealth and the Department entered into grant agreements under the JTPA for 1994, 1995 and 1996. The agreements designated the

Commonwealth's brief.

Commonwealth's Executive Office of Economic Affairs (EOEA)⁵ as the grant recipient of the JTPA funds. GX 8-10. EOEA then designated two of its agencies to disseminate and monitor the expenditure of the JTPA funds. The Massachusetts Department of Employment and Training (DET) was delegated responsibility for JTPA Title II funds, and the Massachusetts Industrial Services Program (ISP)⁶ was delegated responsibility for JTPA Title II funds. These agencies, in turn, disseminated the grant funds to 16 subrecipient Service Delivery Areas (SDAs) including the subrecipient SDA involved in this proceeding which is variously referred to as the Southern Essex SDA, Northshore SDA or Lynn SDA. ALJX 21 (affidavits of Alice Sweeney and Elisabeth Durkin).

On May 18, 1995, the Commonwealth filed an incident report with the Department's OIG, stating that the grant monitoring activities of the DET and ISP had identified financial mismanagement of JTPA funds by the subrecipient City of Lynn and Northshore Employment Training (NET), the administrative entity for the Southern Essex SDA. GX 26. On October 10, 1995, the Commonwealth designated the Southern Essex SDA/NET as a "high risk" subrecipient pursuant to 29 C.F.R. §627.423 which authorizes the imposition of funding restrictions on the subrecipient. GX 24. On November 16, 1995, the Commonwealth issued notification of initial findings to Patrick J. McManus, the Mayor of Lynn and lead elected official for the Southern Essex SDA, questioning \$8,511,695.96 in costs under JTPA programs for 1994 through 1996. GX 23. Thereafter, on March 26, 1996, the Commonwealth served Mayor McManus notice of its final findings and determination to disallow \$1,565,352 in JTPA costs for 1994-1996 and questioning an additional \$7,153,774 in JTPA costs pending completion of an independent audit. GX 21. By letter dated April 10, 1996, the DET notified NET that its fiscal system had been decertified for the following reasons:

The review demonstrated that the fiscal systems maintained by NET are not operational or coherent and cannot be certified. NET failed to adequately implement the mutually agreed upon Corrective Action plan during the period beginning March 20, 1995 through the most recent monitoring on March 8, 1996. The fiscal systems fail to safeguard the integrity of JTPA funds and programs, making it clear that NET cannot be viewed as a viable entity to administer the JTPA Program for Fiscal Year 1997.

GX 20. This final determination was subsequently revised on August 7, 1997 and August 5, 1997 with a final disallowance of \$9,160,208 in JTPA costs for 1994-1996. GX 13, 18.

⁵ As a result of a 1997 reorganization, the EOEA's responsibilities were assigned to two agencies, the Department of Economic Development (DED) and the Department of Labor and Workforce Development (DLWD). TR 38-39.

⁶ The ISP was subsequently renamed as the Corporation for Business, Work and Learning. M.G.L. c. 43, §165 (1997).

On April 11, 1996, the City of Lynn appealed DET's March 26, 1996 final findings and determination, and the matter proceeded to a hearing before a DET Hearing Officer. On February 20, 1997, the Hearing Officer issued a recommended decision upholding the disallowance of \$6,340,397 in JTPA costs after finding that the sole issue raised by the City of Lynn's appeal was its liability to repay the disallowed costs. GX 16. On February 28, 1997, the DET Deputy Director adopted the Hearing Officer's findings and recommended decision as his final decision. GX 16 at 1. The City of Lynn then filed a civil action in state Superior Court seeking review of the DET Deputy Director's decision pursuant to M.G.L. c. 30A, §14.⁷

On March 13, 1997, the DET sent a letter to the City of Lynn notifying it that the Commonwealth was establishing a debt owed by the City of Lynn to the Commonwealth in the amount of \$6,340,397 and demanding repayment of that amount. GX 15. After an attorney representing the City of Lynn responded to this notice,⁸ the DET sent a letter dated April 17, 1997 to the City's attorney, requesting submission of a repayment plan and advising that "[a] request for waiver of liability in this matter is not appropriate as the JTPA Regulations at [29 C.F.R.] provide that a waiver of liability can be granted only when the misexpenditure of JTPA funds was not a violation of section 164(e)(1) of the Act,"⁹ including failure to maintain accepted standards of administration." GX 14.

It appears that the Commonwealth submitted a status report to the ETA Regional Administrator on July 11, 1997.¹⁰ By letter dated July 18, 1997, the ETA Regional Administrator, Robert J. Semler responded to the Commonwealth's status report. Mr. Semler complemented the Commonwealth's "continued diligence in the resolution of the City of Lynn/Northshore Employment and Training disallowance issue" but expressed concern that "the City of Lynn has not yet established a repayment schedule with the Commonwealth for the previously established debt of \$6,340,397 and appears to be using all conceivable avenues to avoid its clear responsibility for repayment." CX 1. Although Regional Administrator Semler commended the

⁷ M.G.L. c. 30A, §14 provides that, except where expressly precluded by law, any person aggrieved by a final decision of a state agency in an adjudicatory proceeding may obtain judicial review of that decision where no statutory form of appeal or judicial review is provided by filing a civil action in superior court. In its opposition to the Grant Officer's motion for summary judgement, the Commonwealth states that the Superior Court has remanded the matter to the Hearing Officer for clarification of his decision.

⁸ The correspondence from the City's attorney is not in record.

⁹ Section 164(e)(1) provides that a recipient shall be liable to repay funds granted under the Act upon a determination that the misexpenditure of funds was due to "willful disregard of the requirements of this Act, gross negligence, or failure to observe accepted standards of ministration." 29 U.S.C. §1574(e)(1).

¹⁰ The status report is not in the record.

Commonwealth for its “full and good faith effort” in resolving the matter, he cautioned that the Commonwealth, as the direct recipient of JTPA funds, was ultimately liable for any disallowances incurred by its subrecipients, and he stated that the Commonwealth was not eligible to request a waiver of its liability:

In the event that the Commonwealth is unable to collect these disallowed funds from the City of Lynn as the responsible sub-recipient, the U. S. Department of Labor will issue a Findings and Determination to the Commonwealth and will establish a debt for the entire amount of these funds against the Commonwealth. In accordance with Section 164(e)(1) of the Act, these funds may not be offset but must be repaid from funds other than funds received under JTPA.

Further, as we have stated previously in our response to Senator Kennedy's inquiry on this matter (see enclosure), since these disallowed costs result from violations of Section 164(e)(1) of the JTPA legislation, the Commonwealth of Massachusetts is not eligible to request a State Waiver of Liability.

*Id.*¹¹ As mentioned previously, DET issued a revised Final Findings and Determination on August 5, 1997, disallowing a total of \$9,160,208 in JTPA costs and establishing a revised debt in that amount against the City Of Lynn. GX 12.

On August 12, 1997, the OIG transmitted a final audit report to the ETA.¹² GX 7. Following her receipt of the audit report, the Grant Officer issued an Initial Determination to the Commonwealth on January 20, 1998, tentatively disallowing \$9,107,986 in costs under the JTPA program for fiscal years 1994 through 1996. GX 5a-b. In arriving at this figure, the Grant Officer noted that the auditors had identified a total of \$7,189,920 in JTPA Title II costs which had been disallowed by the Commonwealth against the Lynn SDA for 1994-1996 but that \$52,222 in disallowed costs involved the Americorps program which is not under the purview of the Department of Labor. Accordingly, the Grant Officer found that the total in JTPA Title II disallowed costs was \$7,137,698 which, when added to an additional \$1,970,288 in JTPA Title III costs that had also been disallowed by the Commonwealth, brought the total in disallowed JTPA costs to \$9,107,986. *Id.* at 6.

¹¹ Subsequent to the hearing on the motion for summary judgement, the Department offered a copy of a May 16, 1997 letter from Regional Administrator Semler to Senator Edward M. Kennedy. Grant Officer's Reply to Complainant's Opposition to Motion for Summary Judgement, Exhibit 1.

¹² It appears that the audit for the fiscal year ending on June 30, 1996 was conducted by Deloitte and Touche, LLP, CPAs, pursuant to OMB Circular A-128 and the Single Audit Act of 1984. GX 5b at 1. The audit report found that a total of \$7,189,920 in JTPA costs had been disallowed or questioned by the Commonwealth through its monitoring of the Southern Essex SDA. GX 7 at 48.

The Commonwealth responded to the Initial Determination in a letter dated March 25, 1998 from the DLWD Director to the Grant Officer. GX 6. The DLWD Director advised that the City of Lynn had filed an action in Essex Superior Court seeking a declaratory judgement overturning the Commonwealth's administrative determination which established a debt against the City based on the alleged misexpenditure of JTPA funds. The Director also stated,

We suspect that a substantial amount of appropriate JTPA services were provided by Lynn during the relevant period. However, to date, the City has not identified any documents that we believe would satisfy USDOL's audit requirements in order to mitigate the amount of disallowed costs. We are hopeful that the Commonwealth will have access to information through the litigation pending in Superior Court which may, at some future date, permit us to petition USDOL to reduce the disallowed costs. We therefore request that the record be kept open in this matter at USDOL to permit the Commonwealth the opportunity, at a later date, to make such a showing if the facts so justify.

Id. at 2. It does not appear that the Grant Officer ever responded to the Commonwealth's request to hold the record open for submission of additional documentation.

On May 13, 1998, the Grant Officer issued a Final Determination and demand for repayment of \$9,107,986 in disallowed JTPA costs to the Commonwealth. GX 4a-b. In her Final Determination, the Grant Officer acknowledged the Commonwealth's position as set forth in the March 25, 1998 response to the Initial Determination but concluded,

"The audit and the corrective action record establish that the State recipient took appropriate and diligent action, as set out [in] Section[s] 164(e)(2) and 164(b)(1) of the JTPA, in bringing to light and terminating subgrantee misexpenditures that constituted willful disregard of the requirements established at Section 164(e)(1) of the JTPA. The State has also complied with the applicable audit coverage, resolution and debt collection requirements set out at 20 C.F.R. 627.480, and 481. In spite of its efforts, the State has not been able to obtain repayment from the subrecipient or secure its cooperation in a resolution process that could reduce the debt to the State." In light of the foregoing, this Final Determination is being issued unchanged from the initial determination.

Id., Final Determination at 2 (quotations in original).¹³ Pursuant to section 164(d) of the JTPA, 29 U.S.C. §1574(d), the Grant Officer directed the Commonwealth to repay the Department from non-federal funds. GX 4a. The Commonwealth's appeal and request for hearing were then filed on May 29, 1999. GX 2.

III. The Motion for Summary Judgement

¹³ The source of the quoted portion of the Grant Officer's concluding paragraph is unclear.

In the Grant Officer's motion for summary judgement, the Department alleges that there is no genuine issue of material fact in dispute relating to any of the four issues raised by the Commonwealth in its pre-hearing memorandum and that the Grant Officer is entitled to judgement affirming the final determination as a matter of law. ALJX 15 at 4. More particularly, the Department asserts that the Commonwealth is not entitled to a waiver of liability because it never requested a waiver during the informal resolution period before the Grant Officer as required by 20 C.F.R. 627.704(b)(2).¹⁴ *Id.* at 7. It points out that the Commonwealth filed a response to the Grant Officer's initial determination but never mentioned a waiver, presumably because it had already determined that a waiver was not warranted when it stated in the April 17, 1997 letter to the attorney for the City of Lynn that a waiver was not appropriate because the misexpenditure of the grant funds involved a violation of section 164(e)(1) of the JTPA. *Id.* at 7-8. According to the Department, the Commonwealth's conclusion that the subrecipient's misexpenditures were in willful disregard of the requirements of section 164(e)(1) precludes consideration of a waiver since the "JTPA regulations state that waiver can only be considered by the Grant Officer when the misexpenditures do not involve 'a violation of section 164(e)(1) of the Act.' 20 C.F.R. §627.704(c)(2)." *Id.* at 10 (internal quotations in original). Finally, the Department submits that the Commonwealth has not demonstrated substantial compliance with section 164(e)(2) of the Act which is a prerequisite to the granting of a waiver. *Id.* at 8-10.

With regard to the other issues raised by the Commonwealth, the Department contends that the issues of whether this proceeding should be stayed pending the outcome of the state court litigation and whether the Grant Officer has met its burden of production are legal questions which can be decided without an evidentiary hearing, and it asserts that the amount of the disallowed costs is not in dispute because the Grant Officer disallowed the same amount of funds as the Commonwealth had disallowed in the state-level proceeding against the City of Lynn.¹⁵ *Id.* at 10-12.

IV. The Commonwealth's Arguments in Opposition to Summary Judgement

Concerning the waiver issue, the Commonwealth points out that section 164(e)(2) of the

¹⁴ In this regard, 20 C.F.R. §627.704(b)(2) states, "When the ETA Grant Officer is resolving the finding(s) for which a waiver of liability is desired, such request shall be made no later than the informal resolution period described in §627.606(c) of this part." Section 627.606(c) provides that, following the issuance of an initial determination by a grant officer to revoke a recipient's grant in whole or in part, there shall be an informal resolution period of at least 60 days during which the recipient may present documents or arguments to informally resolve the matters placed in controversy by the initial determination.

¹⁵ In this regard, the Department states that the difference between the \$9,160,208 disallowed by the Commonwealth against the City of Lynn and the \$9,107,986 disallowed by the Grant Officer is explained by the fact that the Commonwealth's disallowance included \$52,222 in costs related to the Americorps program which is not funded under the Act. *Id.* at 11.

JTPA requires that “[i]n determining whether to impose any sanction authorized by this section against a recipient for violations by a subgrantee . . . , the Secretary [of Labor] shall first determine whether such recipient has adequately demonstrated that it has --

(A) established and adhered to an appropriate system for the award and monitoring of contracts with subgrantees which contains acceptable standards for ensuring accountability;

(B) entered into a written contract with such subgrantee which established clear goals and obligations in unambiguous terms;

(C) acted with due diligence to monitor the implementation of the subgrantee contract, including the carrying out of the appropriate monitoring activities (including audits) at reasonable intervals; and

(D) taken prompt and appropriate corrective action upon becoming aware of any evidence of a violation of this chapter or the regulations under this chapter by such subgrantee.

Complainant’s Opposition to the Grant Officer’s Motion for Summary Judgement at 4, quoting 29 U.S.C. §1574(e)(2). Since section 164(e)(2) requires the Secretary of Labor to first determine whether a recipient has met the conditions for a waiver, the Commonwealth maintains that a fair inference may be drawn from the language of the JTPA that a recipient should receive notice and an opportunity to demonstrate that it meets the waiver conditions specified in section 164(e)(2)(A) - (D). The Commonwealth further contends that it never received any such notice and opportunity to demonstrate substantial compliance with the conditions of section 164(e)(2)(A) - (D) because the Department had already determined prior to the informal resolution period that it was not eligible for a waiver. *Id.* at 4-5. In this regard, the Commonwealth adverts to the July 18, 1997 letter from ETA Regional Administrator Semler in which Mr. Semler stated that the Commonwealth of Massachusetts is not eligible to request a state waiver of liability since the disallowed costs resulted from violations of section 164(e)(1) of the JTPA. In view of this statement by the ETA Regional Administrator approximately six months prior to the informal resolution period,¹⁶ the Commonwealth argues that it is “disingenuous” for the Department to now assert that the Commonwealth never properly requested a waiver or demonstrated that it has complied with the JTPA’s conditions for granting a waiver. *Id.* at 5. The Commonwealth additionally contends that, if given the opportunity, it could demonstrate compliance with the statutory conditions for a waiver, and it offered documentary evidence (CX 2-4) at the motion hearing to support its contention that it has complied with the applicable conditions. *Id.* at 5-6. Lastly, the Commonwealth disputes the Department’s

¹⁶ The informal resolution period commenced on January 20, 1998 with the issuance of the Grant Officer’s initial determination, GX 1-5b, and ended with the issuance of the Grant Officer’s Final Determination on May 13, 1998. GX 1-4b.

contention that the JTPA and regulations limit consideration of a waiver to those situations which do not involve a violation of section 164(e)(1) by either the recipient or subrecipient of grant funds. Rather, it submits that a better reading of the JTPA and regulations is that misexpenditure of grant funds by a subrecipient does not preclude a recipient from applying for and being granted a waiver. *Id.* at 6.

Concerning the issue as to the amount of disallowed costs, the Commonwealth argues that the Grant Officer has not made any independent finding that the disallowed amounts were not expended in accordance with the JTPA as required by section 164(d) of the JTPA,¹⁷ but rather is merely “piggy backing” on the Commonwealth’s disallowance of costs against the City of Lynn and, thereby, unfairly and unjustly attempting to impose “strict liability” on the Commonwealth. *Id.* at 7. The Commonwealth recites its history of monitoring and corrective action with respect to the Southern Essex SDA/NET, and it asserts that it has documentary evidence that participants were properly served and vendors properly paid from the JTPA funds in question. *Id.* at 7-8, referring to EX 16 (Commonwealth’s supplemental pre-hearing statement). While it concedes that it disallowed \$9,107,186 in JTPA costs against the City of Lynn, the Commonwealth asserts that \$7,749,264 of that amount was based on Lynn’s failure to have an independent audit of JTPA costs for 1995 and 1996, and it suggests that Lynn’s failure should not preclude the Commonwealth from showing through credible documentation that proper expenditures were made. *Id.* at 8.

Finally the Commonwealth reiterates its argument that the instant proceeding should be stayed pending a decision on the City of Lynn’s state court civil action against the Commonwealth. In this regard, the Commonwealth states that it promulgated a Policy Directive pursuant to “20 C.F.R. §624.481” which requires that recipients maintain a grievance and hearing procedure¹⁸ and that the Policy Directive’s provision for an administrative hearing on adverse determinations gives subrecipients the right to appeal an adverse administrative decision to the Superior Court pursuant to M.G.L. c. 30A, §14. Under these circumstances, the Commonwealth contends that, from a practical standpoint, it is precluded from taking further debt collection action against the City of Lynn, and it states that the Court could find that Lynn owes an amount that is different from what the Commonwealth has determined. Since the Grant Officer’s Final Determination was based on the Commonwealth’s determination regarding the amount of disallowed costs, the Commonwealth submits that any action by the Grant Officer to establish a debt against the Commonwealth should await the outcome of the Superior Court case. *Id.* at 8-9.

Based on these arguments, the Commonwealth urges that the Grant Officer’s motion for

¹⁷ Section 164(d) of the JTPA in relevant part provides that “every recipient shall repay to the United States amounts found not to have been expended in accordance with this act.” 29.U.S.C. §1574(d).

¹⁸ The requirement of a recipient-level grievance and hearing procedure is now found at 20 C.F.R. §627.501.

summary judgement be denied and that the case either be remanded to the Grant Officer with an order to allow the Commonwealth to apply for a waiver or that it be set for a hearing on the merits.

V. The Department's Reply

In its reply to the Commonwealth's brief in opposition to the Grant Officer's motion for summary judgement, the Department again asserts that there is no genuine issue of material fact concerning either: (1) whether the Commonwealth is entitled to a waiver of liability; or (2) the proper amount of the disallowance.

The Department contends that the Grant Officer's statement in the Initial Determination that the Commonwealth would have sixty days during the informal resolution period to submit a response put the Commonwealth on notice to raise the issue of waiver; however, the Commonwealth clearly failed to comply with the regulatory requirement that a waiver be requested during the informal resolution proceeding. *Grant Officer's Reply to Complainant's Opposition to Motion for Summary Judgement* at 2-3. The Department also urges rejection of the Commonwealth's argument that ETA Regional Administrator Semler's July 18, 1997 letter foreclosed any opportunity to request a waiver because it contained a predetermination that the Commonwealth was not eligible to request a state waiver of liability. In this regard, the Department contends that the record shows that Regional Administrator Semler's statement merely reflected that Commonwealth's position, as reflected in the April 17, 1997 letter to the attorney for the City of Lynn, that the Lynn situation was not appropriate for a waiver. Thus, the Department submits that real reason that the Commonwealth did not request a waiver was because it had already concluded that a waiver was not appropriate. *Id.* at 3-5. The Department additionally asserts that Mr. Semler could not make a determination that the Commonwealth is ineligible for a waiver "as a matter of law" since the regulations place the responsibility for making waiver determinations on the Grant Officer and not the Regional Administrator. *Id.* at 5. Because the Commonwealth never requested a waiver during the informal resolution stage before the Grant Officer, the Department argues that I should neither consider the evidence the Commonwealth has now submitted in support of its contention that it meets the conditions for a waiver nor remand the case to the Grant Officer because to do so would frustrate the regulatory scheme which requires that waiver requests be timely submitted to the Grant Officer. *Id.* at 5-6. The Department also advances the following argument concerning the Commonwealth's eligibility for a waiver:

The Commonwealth contests the Grant Officer's position that waiver can be considered by the Grant Officer only when misexpenditures do not involve a violation of section 164(e)(1) of the Act. Complainant's opposition, p. 6. The Commonwealth argues that the regulation, section 627.704(c)(2), is unclear whether it is referring to misexpenditures by the recipient or subrecipient and that this regulatory provision is not found in the statute. *Id.* First, it is clear from the language of the statute and the regulation that a recipient may request a

waiver of liability only with respect to misexpenditures at the subrecipient level. Recipients are liable for all misexpenditures under their JTPA grants, 29 U.S.C. §164(d); 20 C.F.R. §627.702(f), and the Grant Officer's determinations and this proceeding constitute the notice and opportunity for hearing required by the Act. Also, it should be noted that the Commonwealth did not share this confusion about the language of the regulations when it responded to the representative of the Mayor of the City of Lynn that a waiver of liability was not appropriate because the misexpenditures constituted a violation of section 164(e)(1). Secondly, the regulatory provision which states that waiver cannot be considered if the subrecipient misexpenditures constitute a violation of section 164(e)(1) is a reasonable interpretation of the statute and a reasonable exercise of the Secretary's rulemaking authority.

Id. at 6-7. With respect to the amount of the disallowed costs, the Department again asserts that there is no genuine issue of material fact because the Grant Officer and the Commonwealth both disallowed the same amounts. In response to the Commonwealth's charge that the Grant Officer merely "piggy backed" on the Commonwealth's determination, the Department admits that the Commonwealth's decisions were considered, but it insists that "there is ample evidence in the record, which was undoubtedly relied upon by the Commonwealth itself,¹⁹ to support the Grant Officer's disallowance of the costs in question." *Id.* at 7. Therefore, the Department submits that it is not inherently unfair in the face of clear evidence of mismanagement of JTPA funds by the Commonwealth's subrecipient for the Grant Officer to disallow the same costs as disallowed by the Commonwealth against the subrecipient. The Department further argues that the Commonwealth's proffered documentation that proper expenditures were actually made from the JTPA grant funds in question should not be considered because the Commonwealth has not offered any evidence that the documentation is reliable and credible or that it meets the "accounting standards and the tests for allowability of costs, including compliance with regulatory requirements." *Id.* at 10-11. Moreover, notes the Department, the existence of this documentary evidence has not prompted the Commonwealth to amend its decision to reduce the amount of disallowed JTPA costs against the City of Lynn. *Id.* at 11.

In conclusion, the Department requests that the Grant Officer's motion for summary judgement be granted and that the Grant Officer's disallowance of \$9,107,986 in JTPA costs against the Commonwealth be affirmed.

¹⁹ It is noted that all of the ample evidence cited by the Department consists of the series of monitoring activities, corrective actions, audit findings and recipient-level determinations undertaken and made by the Commonwealth against the Southern Essex SDA and NET. *Id.* at 7-9.

VI. Discussion and Findings

An administrative law judge may enter summary judgement for either party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. §18.40(d). If the administrative law judge finds that a genuine question of material fact has been raised, the matter must be set for an evidentiary hearing. 29 C.F.R. §18.41(b). In deciding a motion for summary judgment, all factual disputes must be resolved against the moving party and any inferences to be drawn from the facts must be viewed in the light most favorable to the opposing party. *Tom Rob, Inc.*, WAB Case No. 94-03 (WAB July 15, 1994), slip op. at 2. *See also Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 94 (1994) (case arising under the Longshore and Harbor Workers' Compensation Act).

As discussed above, the Commonwealth contends that there are genuine issues of material fact raised with respect to whether the amount of JTPA costs disallowed by the Grant Officer is correct and whether it is entitled to a waiver of liability. The Department contends otherwise, asserting that the amount of disallowed costs is not in dispute as the Grant Officer disallowed the same amounts that the Commonwealth disallowed against the City of Lynn and, further, that the Commonwealth is not entitled to consideration of a waiver as a matter of law because it failed to file a timely request during the informal resolution stage and because the misexpenditure of JTPA funds was in violation of section 164(e)(1) of the JTPA.

The Amount of Disallowed Costs

The Department's position that it is entitled to summary judgement on the issue of the amount of the disallowed costs because it has disallowed the same amounts that the Commonwealth disallowed against the City of Lynn effectively holds a state recipient of JTPA funds strictly liable for any misexpenditure determination that the state makes against a subrecipient. No authority has been cited for this interpretation which I find untenable as it would constructively collapse the separate state and federal level adjudicatory proceedings required by the regulations into a single proceeding where a state recipient's determination to disallow JTPA costs against a subrecipient would be conclusive on the issue of the extent of its liability to repay the disallowed JTPA funds to the federal government. Rather, I concur with Administrative Law Judge James W. Kerr who concluded after careful review of the JTPA and implementing regulations in *State of Texas, Department of Commerce v. U.S. Department of Labor*, Case No. 94-JTP-20 (ALJ November 3, 1995) that,

Section 164 and its implementing regulations allow the recipients of the funds to escape liability for violations of its subrecipient. When the subrecipient has violated the Act, the state or recipient of the funds can issue a final determination indicating that it monitored the subrecipient and took corrective action once it learned of the violations. See 29 U.S.C. §1574(e)(2) (1982 & Supp. 1992). By issuing a final determination disallowing the misexpenditure and establishing a debt, the state

does not eliminate its right to appeal a finding of its liability or lose the right to request a waiver of liability.

Slip op. at 12 (citation in original).²⁰ Therefore, I find that the Commonwealth is entitled to contest the amount of its liability for the JTPA costs disallowed against the City of Lynn and to offer evidence that such costs were properly incurred under the JTPA. The record shows that the Commonwealth attempted to do this during the informal resolution phase before the Grant Officer. That is, the Commonwealth advised that Grant Officer in its response to the initial determination that it suspected a substantial amount of appropriate JTPA services had been provided by the subrecipient, and it requested that the record be held open so that it would have the opportunity to submit documents, which it hoped to obtain through discovery in the Superior Court case, to establish the propriety of the expenditures and thereby mitigate the amount of disallowed costs. The Grant Officer did not grant this request and instead proceeded to issue her final determination which was “unchanged” from the initial determination and which disallowed the entire \$9,107,986 in JTPA costs that had been disallowed by the Commonwealth against the City of Lynn. In response to the Grant Officer’s motion for summary judgement, the Commonwealth has now offered documentary evidence which purportedly shows that proper expenditures were actually made from the JTPA grant funds in question. However, the Department contends that this evidence should not be considered because the Commonwealth has not demonstrated the documentation is reliable and credible or that it satisfies the applicable accounting standards. In my view, these contentions reflect that there is an issue presented concerning the credibility and weight to be accorded to evidence which clearly raises a genuine question of material fact. Therefore, I find that the Commonwealth is entitled to an evidentiary hearing, and the Grant Officer’s motion for summary judgement on this issue must be denied.

I also find that the particular circumstances of this case, most notably the fact that the Grant Officer issued an unchanged final determination on the Commonwealth’s liability to repay the disallowed costs without considering the Commonwealth’s request for additional time to submit mitigating evidence of proper expenditures and the fact that the Commonwealth has now offered evidence in an effort to show the propriety of the JTPA expenditures which was not considered during the informal resolution stage, warrants a remand to the Grant Officer. *See State of Washington v. U.S. Department of Labor*, Case No. 90-JTP-9 (Sec’y September 13, 1995), slip op. at 3, citing *U.S. Department of Labor v. Steuben County, New York*, Case No. 83-

²⁰ Judge Kerr’s recommended decision and order was affirmed in part and reversed in part by the Administrative Review Board (ARB) in *State of Texas, Department of Commerce v. U.S. Department of Labor*, ARB Case No. 96-128 (December 11, 1996). The ARB did not specifically address Judge Kerr’s finding that a state does not forfeit its right to appeal a finding of its liability or to request a waiver by making a final determination to disallow an expenditure and establish a debt against a subrecipient. On appeal, the Fifth Circuit reversed the ARB and rendered a judgement in accordance with Judge Kerr’s recommended decision and order. *Texas Department of Commerce v. U.S. Department of Labor*, 137 F.3d 329 (1998).

CTA-162 (Sec'y July 12, 1995) (*Steuben County*).²¹ This finding is not intended as a criticism of the Grant Officer who acted in accordance with the regulations; only that subsequent developments and the current posture of the case demonstrate that a remand is necessary in the interests of justice and a full and fair adjudication of the matters in dispute.

The Commonwealth's Eligibility for a Waiver of Liability

With regard to this issue, I find, after viewing the facts in the light most favorable to the Commonwealth, that there is a genuine question of material fact as to whether the Commonwealth had concluded that it could not apply for a state waiver when the DET sent the April 17, 1997 letter to the attorney for the City of Lynn or whether it was simply advising the City that it could not request a waiver as a subrecipient because the misexpenditure of funds was in violation of section 164(e) of the Act.²² Based on the chronology of events outlined above, I

²¹ In the *Steuben County* case which arose under the JTPA's predecessor legislation, the Comprehensive Employment and Training Act of 1973 (CETA), Pub. L. No. 93-203, 87 Stat. 839 (1973), the Secretary of Labor held that a remand to the Grant Officer was appropriate where the Grant Officer neglected to determine whether under-reported costs, which an audit found to have been expended by the grant recipient, were allowable under the relevant grants, because the CETA regulations required the Grant Officer to ensure that audit findings were resolved. In this regard, the Secretary stated,

This requirement applies to findings that favor the grantee as well as those that indicate that grant funds may have been misspent. To interpret the regulation otherwise would destroy the cooperative nature between the Federal Government and the units of government that acted as CETA prime sponsors, and transform the audit process from a neutral inquiry to assure the proper expenditure of grant funds and may make prime sponsors unwilling if unwitting, financial contributors to the administration of CETA.

Slip op. at 2-3.

²² It is noted that the JTPA regulations formerly allowed the Secretary of Labor to permit a State to forego collection of misspent funds from a subrecipient, where the subrecipient was not at fault with respect to the liability requirements set forth at section 164(e)(2) of the JTPA. 20 C.F.R. §629.44(d)(4)(1992). Thus, the regulations extended the JTPA's waiver provision, which applies to grant recipients, to subrecipients who might otherwise be subjected to the recovery of funds due to the impermissible actions of its subgrantees. *Commonwealth of Pennsylvania v. U.S. Department of Labor*, Case No. 92-JTP-12 (Sec'y March 5, 1995), slip op. at 3.

find it entirely plausible that the Commonwealth never made any determination that it was ineligible to request a waiver and that the ETA Regional Administrator's statement in his July 18, 1997 letter that the Commonwealth was not eligible to request a *state* waiver of liability was reasonably interpreted by the Commonwealth as predetermination by the Department on this issue and an indication that it would be an exercise in futility to request a state waiver during the informal resolution phase before the Grant Officer.

Having raised a genuine issue of material fact, the Grant Officer's motion for summary judgement on this issue must be denied. Since I have decided to remand the case to the Grant Officer, I will include in my order an instruction that the Grant Officer allow the Commonwealth an opportunity to request a state waiver of liability and include a specific finding on the Commonwealth's entitlement to a waiver in the revised final determination. In determining that the Commonwealth should now be afforded an opportunity to request a waiver, I am cognizant of the Department's argument that a waiver may not be considered as a matter of law because the subrecipient City of Lynn's misexpenditures were in violation of section 164(e)(1) of the JTPA. Without ruling on this matter at this time, I note that the JTPA does not clearly proscribe consideration of a recipient's request for waiver of liability when a subrecipient has misexpended

funds in violation of section 164(e), that the regulations are arguably ambiguous in terms of whether the reference to a violation of section 164(e) refers to violations by recipient or the subrecipient,²³ and no case law has been cited in support of the Department's proffered interpretation. In fact, at least one case addressing the conditions for a waiver arguably appears to stand for the proposition that a recipient may be granted a waiver provided that the misexpenditure of JTPA funds is attributable to a subrecipient's violation and provided that the recipient otherwise satisfies the conditions for a waiver. *See State of Washington v. U.S. Department of Labor*, Case No. 90-JTP-29 (Sec'y September 13, 1995), slip op. at 2 (JTPA "provides for a waiver of the imposition of sanctions against a recipient due to a *subgrantee's* misexpenditure of JTPA funds, if the recipient can adequately demonstrate that it substantially complied with the requirements set forth in Section 164(e)(2)"). Moreover, even assuming that the Department is correct in its position that a violation of section 164(e) by a subrecipient precludes consideration of a waiver request from a recipient is correct, the administrative proceedings before the Grant Officer on remand could result in a determination that the misexpenditure was not in violation of section 164(e), thus permitting consideration of the Commonwealth's request for a waiver of its liability.

VII. Conclusion

Based on the foregoing discussion and findings, I will order that the case be remanded to the Grant Officer to: (1) provide the Commonwealth with an opportunity pursuant to 20 C.F.R. §627.606(c) to submit evidence in support of its position that its liability should be reduced to the extent that it can demonstrate that any of the disallowed costs were expended in conformity with the requirements of the JTPA and regulations, and an opportunity to request a waiver of its

²³ Regarding waivers, 20 C.F.R. §627.704 provides:

(b) A waiver of the recipient's liability can only be considered by the Grant Officer when:

(1) the misexpenditure was not a violation of section 164(e) of the Act, or did not constitute fraud;

(2) the misexpenditure of JTPA funds occurred at a subrecipient level;

(3) the recipient has issued a final determination which disallows the misexpenditure, the recipient's appeal process has been exhausted, and a debt had been established; and

(4) the recipient requests such waiver and provides documentation to demonstrate that it has substantially complied with the requirements of section 164(e)(2) (A), (B), (C), and (D) of the Act.

liability pursuant to 29 U.S.C. §1574(e)(2) and 20 C.F.R. §627.704; and (2) issue a revised written final determination pursuant to 20 C.F.R. §627.606(d) after consideration of any evidence and argument presented by the Commonwealth if the matter is not fully resolved informally. Finally, I will retain jurisdiction over this matter to conduct any evidentiary hearing as may be appropriate upon issuance of the Grant Officer's revised final determination.

VIII. Order

IT IS HEREBY ORDERED that this case is remanded to the Grant Officer for the following actions:

(1) to provide the Commonwealth with an opportunity pursuant to 20 C.F.R. §627.606(c) to submit evidence in support of its position that its liability should be reduced to the extent that it can demonstrate that any of the disallowed costs were expended in conformity with the requirements of the JTPA and regulations and an opportunity to request a waiver of its liability pursuant to 29 U.S.C. §1574(e)(2) and 20 C.F.R. §627.704; and

(2) to issue a written revised final determination pursuant to 20 C.F.R. §627.606(d) after consideration of any evidence and argument presented by the Commonwealth.²⁴

IT IS HEREBY FURTHER ORDERED that in the event that the matter is not fully resolved informally on remand, the Grant Officer shall, upon issuance of a revised final determination, submit an updated administrative file to me in accordance with 20 C.F.R. §627.802(e), at which time I will cause a new notice of hearing to be issued.

Daniel F. Sutton
Administrative Law Judge

Dated: April 14, 1999
Camden, New Jersey

²⁴ If the matter is resolved informally, the Grant Officer shall issue a revised final determination pursuant to 20 C.F.R. §627.606(c), notifying the Commonwealth and this administrative law judge in writing of the nature of the resolution, and the Grant Officer may close the file.